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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-205191

DATE: April 6, 1982

MATTER OF: American Coalition of Citizens with
Disabilities, Inc.

DIGEST:

1. Although findings and recommendations of technical evaluation panel are not binding on the contracting officer, the ultimate selection decision must be rationally supported on the record.
2. Agency determination, under solicitation which states that technical considerations are paramount, to award to slightly higher scored, slightly higher cost offeror is reasonable and supportable.
3. Assuming proposal upon which award was based ultimately failed in one minor respect to conform to solicitation, award is nevertheless supportable because of negligible effect on proposed cost and technical superiority of awardee's proposal.
4. Proposal which exceeds, but is not inconsistent with, solicitation requirement is not objectionable and is not prejudicial to the protester.

The American Coalition of Citizens with Disabilities, Inc. (ACCD) protests the award of a cost reimbursement contract to Barrier Free Environments, Inc. under request for proposals (RFP) 81-045 issued by the Department of Education. The RFP solicited proposals for the training of handicapped individuals and their representatives concerning their rights and responsibilities under Section 504 of the Rehabilitation Act of 1973, Public Law No. 93-112, 87 Stat. 355 (1973). We deny the protest.

ACCD contends that the contracting officer's rejection of the technical evaluation panel's findings and of a recommendation to award to ACCD was arbitrary and that

the award to Barrier on the basis of a proposal which had a higher cost and a slightly higher technical point score than ACCD's proposal was unjustified. ACCD also contends that Barrier's proposal did not meet a material requirement of the RFP. Last, the protester alleges that Barrier proposed to furnish reports which are more extensive than the solicitation requires them to be, impermissibly escalating the cost to the Government.

Section 504 of the Rehabilitation Act provides that:

"No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The purpose of the solicitation is to provide training and technical assistance concerning Section 504 to handicapped persons and their representatives located in the southern United States. The RFP requires the contractor to provide the personnel, facilities, equipment and materials for orientation and training workshops and for follow-up technical assistance. The RFP also requires the contractor to pay the lodging, meal, and, in certain cases, travel costs of participants in the workshops.

The RFP advises offerors that "award will be made to that offeror whose proposal represents the combination of technical merit and cost which is most favorable to the Government. However, technical considerations will be of paramount importance." The RFP further provides that proposals will be evaluated on the basis of technical approach (35 points), project management and utilization of key staff (35 points) and corporate management (30 points).

A five member technical evaluation panel evaluated the proposals. Barrier received a technical score of 92.8 out of the possible 100 points, while ACCD received a score of 90.5 points. Barrier offered to perform at an estimated cost of \$478,956.00, while ACCD offered to perform for \$461,950.20, a difference of \$17,005.80. The panel regarded both offers as "fully acceptable and approximately equal in cost and score" and declined to recommend award to either of the two firms. The project manager considered

the panel's findings and recommended that because the two offerors are not significantly different with regard to their prospective effectiveness, award should be made to ACCD on the basis of its lower costs. The contracting officer rejected this recommendation and, on the basis of the 2.3 point advantage in technical score, awarded the contract to Barrier.

ACCD points out that the Department erred in averaging the scores of the five panelists. ACCD contends that its score actually is 91, not 90.5, and that consequently Barrier's technical advantage is 1.8, not 2.3. The Department agrees that it erred and that the margin actually is 1.8, but states that the reduction in the point differential does not alter its determination to award to Barrier. The record indicates, however, that, aside from the mathematical error cited by ACCD, the Department erred in compiling the average technical scores by including the scores of one panelist which were based upon the evaluation of the initial proposals instead of the best and final offers. The elimination of that panelist's scores (the panelist did not score the final offers) from the calculation results in a 2.5 point differential.

We note initially that the evaluation panel itself made no recommendation as between the two firms. Additionally, the project manager's recommendation to award to ACCD is of little import because he has no contracting authority and he was not involved in the evaluation process. It is the function of the source selection official, and no one else, to weigh the various factors discerned by evaluators in making a selection decision. See Burns and Roe Tennessee, Inc., B-189462, July 21, 1978, 78-2 CPD 57. As to the panel's finding that the two firms were equally effective technically, we have held that the conclusions of technical evaluators are not binding on the contracting officer. The ultimate selection decision, however, must be rationally supported on the record. ABT Associates, B-196365, May 27, 1980, 80-1 CPD 352. We believe that, for the reasons stated below, the decision to award to Barrier was rational.

In a negotiated procurement, there is no requirement that award be made on the basis of the lowest cost. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; Health Management Systems, B-200775, April 3, 1981, 81-1 CPD 255. Rather, the procuring agency has the discretion to select a highly rated technical proposal instead of a lower rated, lower cost proposal if doing so is in the best interest of

the Government and is consistent with the evaluation scheme set forth in the RFP. Within the framework established by the RFP, agency officials necessarily are given a considerable range of discretion, and their judgment will be questioned by our Office only upon a clear showing of unreasonableness. David A. Clary, B-200877, April 28, 1981, 81-1 CPD 326; Nanex Systems Corporation, B-193252, February 14, 1979, 79-1 CPD 105.

In the exercise of that judgment, selection officials may, in certain cases, select either of two competitors and still be in accord with the selection criteria, since what is ultimately required is no more than a good faith subjective determination that one proposal is or is not technically superior to another and is or is not worth whatever additional cost might be associated with it. See generally Telecommunications Management Corp., 57 Comp. Gen. 251 (1978), 78-1 CPD 80; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Thus, in this case, we believe the contracting officer could have reasonably determined that there is no meaningful advantage to the Barrier proposal and that the ACCD proposal should be selected in light of its potential for slightly lower costs. On the other hand, we believe the contracting officer could have concluded, as he apparently did here, based upon the average scores received by the two firms, that the panelists perceived some relative technical advantage in Barrier's proposal and that this advantage was worth the higher proposed costs. This determination is especially supportable in view of the RFP's emphasis on technical merit and the fact that, since this is a cost-reimbursement contract, there is no assurance that the slight cost advantage of the ACCD proposal would be realized. We cannot say that such a conclusion is clearly unreasonable.

ACCD next contends that Barrier's proposal is nonresponsive because it does not provide for an evening meal on the last day and the next to last day that the workshop is in session. As noted above, the RFP requires the contractors to provide meals for the participants in the training workshops. ACCD believes this omission in Barrier's proposal is significant in view of the close technical ratings and cost of the two proposals and contends that the omission may have affected the ultimate selection.

We point out that the rigid rules of bid responsiveness in formally advertised procurements are not directly

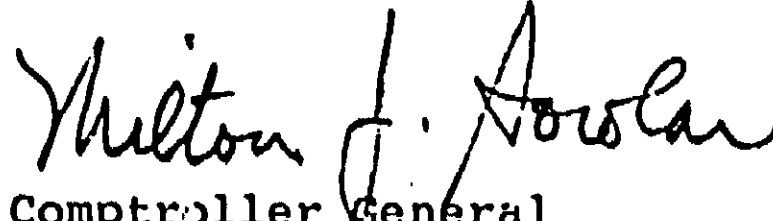
applicable to negotiated procurements. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. The fact that a proposal may not fully conform to the RFP is not cause for rejection if the deficiencies are reasonably subject to correction through discussions. The proposal must, however, ultimately conform to the requirements of the solicitation. Motorola Inc., Communications Group, B-200822, June 22, 1981, 81-1 CPD 514. Any proposal which ultimately fails to conform with material terms of the solicitation should be considered unacceptable and should not form the basis of an award. See Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358.

Initially, we observe that the meals requirement is not precisely stated. The RFP generally states that the offeror must provide meals, but it does not specify how many meals need be provided. Moreover, it is not at all clear that the RFP may be interpreted to require an evening meal on the last day of the session after the training has ended. Indeed, ACCD itself did not propose to provide an evening meal on the last day of training.

Importantly, even if Barrier had been required to provide the omitted evening meal (we need only consider the next to last day meal since ACCD also failed to provide a last day meal), the effect on the relative cost standing of the two firms would have been minimal. Based on information contained in ACCD's cost proposal, the cost to ACCD of providing the meal is \$5,610 (\$8.50 per meal x 660 participants). Although Barrier's cost proposal does not indicate its costs on a per meal basis, it appears that Barrier's cost would have been substantially lower than \$5,610 since its total meal and lodging cost is substantially less than ACCD's. Even assuming a \$5,610 increment, ACCD's cost advantage would rise only 1.11 percent (from 3.55 percent to 4.67 percent). We do not believe this would materially alter the selection in view of the cost/technical tradeoff analysis above; the award to Barrier, on the basis of technical advantage under an RFP where technical considerations are paramount is supportable whether ACCD's cost advantage is 3.55 percent or 4.67 percent. Under the circumstances, we find that ACCD was not prejudiced by the omission and that it has not presented a basis upon which to disturb the award.

Last, ACCD alleges that Barrier proposed to submit technical assistance reports which are more extensive than the solicitation requires them to be, improperly escalating the costs that the Government must reimburse. The inclusion in a proposal of characteristics which exceed, but are not inconsistent with, RFP requirements is not necessarily objectionable even in the context of a cost-reimbursement contract. See Ford Aerospace & Communications Corporation, B-200672, December 19, 1980, 80-2 CPD 439. Moreover, we fail to see how this factor has prejudiced ACCD. To the extent that Barrier's costs were increased by the added scope of the reports, its cost competitiveness was commensurately decreased to the obvious advantage of ACCD. Thus, this contention is without merit.

The protest is denied.

for 
Comptroller General
of the United States